Supreme Court, U.S.
FILED
JAN 14 1999
CLERK

No. 98-554

In The

Supreme Court of the United States

October Term, 1998

KENNETH W. LEE,

Petitioner,

vs.

ROBERT C. HUGHES, JR. and
DANIEL C. LANFORD, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

1. Whether United States Probation Officers, as excepted service employees of the Judicial Branch, may bring *Bivens* actions for unconstitutional discrimination in their employment?

(The United States Court of Appeals for the Eleventh Circuit, in the case at bar, answered this Question in the negative, while the United States Court of Appeals for the Eighth Circuit has answered this Question in the affirmative.)

PETITIONER'S REPLY BRIEF

Pursuant to SUP. CT. 15.6, Petitioner hereby responds to matters asserted for the first time in the *Brief in Opposition*.

On pages 8-9, in the *Brief in Opposition*, Respondents, with reference to the district court EEO plan, state: "Under the Back Pay Act of 1966, a court employee who successfully invokes that administrative remedy may be entitled to back pay plus interest." The Respondents in the court of appeals below, represented there also by the Department of Justice, stated more precisely:

> In the event that an employee's complaint is sustained by the Chief Judge, the Chief Judge could reinstate an improperly terminated probation officer, pursuant to 18 U.S.C. § 3602(a). Moreover, if the employee incurred any lost pay, the employee would be entitled to back pay, with interest, pursuant to the Back Pay Act, as amended in 1990. In the Back Pay Act, Congress provided that if a covered federal employee is found "by appropriate authority under applicable law, rule [or] regulation" to have been "affected by an unjustified or unwarranted personal action" resulting in a loss of pay, the employee is entitled, "on correction of the personnel action," to the lost pay with interest. *See* U.S.C. § 5596(b)(1)(A)(i), (b)(2)(A).
>
> As the district court recognized, a Back Pay Act remedy would be available to a party prevailing in the administrative grievance process available to Plaintiff here. *See* R-25 at 3.

Supp. Pet. App. 15a. *See also* Pet. App. 16a. As Respondents are aware, pursuant to their joint presentation with Petitioner to the court of appeals below, Petitioner was not fired, and thus did not lose pay, *until* the Chief Judge approved the Magistrate's proposed finding and denied the Petitioner's remedy under the EEO plan. Supp. Pet. App. 17a-18a, 20a.

Accordingly, under the Respondents' position in this litigation, Petitioner has no remedy under the Back Pay Act, because he lost no pay prior to the final administrative decision, and he did not prevail on the administrative level. *See also United States v. Fausto*, 484 U.S. 439, 454 (1988). The Back Pay Act is only a limited waiver of sovereign immunity in order to allow a claimant to recover back pay that he should have been awarded as a result of prevailing on the administrative level. The Back Pay Act creates no substantive cause of action for an aggrieved Judicial Branch employee who lost on the administrative level. *Cf. United States v. Smith*, 499 U.S. 160, 174-175 (1991)(Gonzales Act does not create medical malpractice cause of action, but is only a waiver of sovereign immunity).

Petitioner notes that Congress has not closed the precise "hole" in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(a)[and as continued in the Civil Service Reform Act ("CSRA")], which "hole" this Court found determinative in *Davis v. Passman*, 442 U.S. 228 (1979). This Court's seminal decision in *Bush v. Lucas*, 462 U.S. 367 (1983), on the impact of CSRA on constitutional damage claims, expressly distinguished the case of persons such as Ms. Davis and others (to include this Petitioner) who have no statutory remedy at all for claims of unconstitutional discrimination, in both the main opinion, *id.*, at 378 & n. 14, and the concurring opinion, *id.*, at 390-391.

Petitioner would also like to respond to an area raised for the first time in the *Brief in Opposition*, at 10, wherein Respondents argue: "Congress described the AO Act as establishing a 'comprehensive personnel system' for Administrative Office employees, H.R. Rep. No. 770," and in their preceding paragraph on the same page: "Petitioner is not an employee of the Administrative Office and therefore is not entitled to invoke the specific administrative remedies that the Administrative Office created through that Act." Yet on page 11 of the *Brief in*

Opposition, the Respondents argue: "The CSRA, coupled with other congressional actions, including enactment of the AO Act and amendment to the Back Pay Act of 1966, accordingly manifests Congress's policy determination that Judicial Branch personnel, such as petitioner, who seek to challenge adverse personnel action are to do so through the Judicial Branch's administrative remedies."

First, a House Report that deals with AO employees is not an expression of the entire Congress's intent on any remedy for employees outside the AO. *Cf. Pierce v. Underwood*, 487 U.S. 552, 566-568 (1988).

Second, the *Study of Judicial Branch Coverage Pursuant to the Congressional Accountability Act of 1995* responded to Congress with the opinion that the district court EEO plan and the Back Pay Act were sufficient, *id.*, at 6, and the opinion that none of the enumerated eleven (11) labor-employment statutes, including Title VII of the Civil Rights Act of 1964, needed to be extended to Judicial Branch employees. *Id.*, at 16-19. It is too expansive for Respondents to argue this demonstrates Congress's specific legislative intent for *no* race discrimination claim to be raised by a non-AO judicial employee in a *Bivens* action. Moreover, the *Study* presupposes that a hearing will be provided to a complainant under the district court EEO plan. *Id.*, at 6. Yet in the case at bar, it is undisputed that Petitioner did not receive such a hearing. Pet. App. 3a. Instead, the chief district judge specifically declared that there would be no evidence, witnesses, or other evidentiary hearing. Supp. Pet. App. 19a.

Moreover, both of the Respondents' foregoing issues are made while repeating the phrase "adverse personnel action," as though this phrase dispositively and correctly described the claim brought by Petitioner. This phrase obscures the very essence of the claim that Petitioner was discriminated against on the basis of his race. Current and former employees of the U.S. Probation Office for the Middle District of Georgia were disclosed in the mandatory interrogatory answers required to be filed with the

Complaint, parallel to FED.R.CIV.P. 26(a)(1)(A), that Respondent Hughes had made a statement referring to Petitioner that they perceived [and which a jury could find] as racist in his explanation for Petitioner's discharge; that a number of Assistant U.S. Attorneys in the criminal division of the U.S. Attorney's Office for the Middle District of Georgia, including the Chief of the division, were prepared to testify on Petitioner's behalf and how surprised they were about his discharge; that the other (white) probation officers listed were prepared to testify that they did not receive annual performance appraisals subsequent to their initial probationary period, in contrast to the performance appraisals of a derogatory nature submitted against Petitioner by Respondents, in violation of applicable regulation and regular procedures; that Petitioner was denied necessary training in new procedures, unlike white probation officers; that Petitioner was denied new equipment and office furniture for so long, unlike white probation officers, that it became an office joke; that the other probation officers considered Petitioner a good and experienced worker and mentor, pleasant to be around, and that they were shocked by his firing; that a member of the criminal defense bar was prepared to testify as to Petitioner's good work and how he was surprised by the termination; that another U.S. magistrate judge before whom Petitioner regularly worked as a probation officer was prepared to testify that Petitioner's work was both good and the same as the other (white) probation officers in the district, and that the magistrate judge had directly told Respondents so. Supp. Pet. App. 1a-3a, 4a-13a.

Race discrimination, in any form, has long been unconstitutional under this Court's precedents. Indeed, race relations have had constitutional magnitude or import since the very adoption of the Constitution, in which the Constitution provided for allocation of representatives in the United States House of Representatives using a modified counting system to account for the

African slaves. U.S. CONST., ART. I, §§ 2, 9; ART. 4, § 2. After the Civil War, the Congress expressly took race into account in proposing the Thirteenth and Fourteenth Amendments, which the several States ratified. U.S. CONST., AMEND. XIII & XIV. This Court is still extremely sensitive about the role of race in all aspects of our constitutional form of government, e.g., reapportionment. *Cf. Miller v. Johnson*, 515 U.S. 900, 920 (1995) (strict scrutiny applied to race-based redistricting). These concerns are patently absent from the issues presented and ruled on in *United States v. Fausto*.

This brings us back to this Court's ruling in *Bush v. Lucas*, in which the majority opinion noted that the decision in that case would be different if there was no other statutory remedy for a constitutional wrong, 462 U.S., at 378 & n. 14, and in which the concurring opinion by Justice Marshall noted the role of the Back Pay Act. 462 U.S., at 390-391. As shown above, Petitioner has no Back Pay Act remedy. He has no statutory remedy at all.

Hence, the Eighth Circuit's focus on the district court EEO plan in *Duffy v. Wolle* and the Eleventh Circuit's focus on CSRA in this case are two permutations of the same prong from *Carlson v. Green*, 446 U.S. 14, 19 (1980), i.e., the lack of an adequate alternative statutory remedy. The Circuits are indeed "split."

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MYLES E. EASTWOOD
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Counsel of Record for
Petitioner Kenneth W. Lee

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SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

KENNETH W. LEE, Plaintiff, V. ROBERT C. HUGHES, JR. and DANIEL C. LANFORD, JR., Defendant.	)	CIVIL ACTION NO. 5:96-CV-316-3

COMPLAINT

* * *

78.

Subsequent to Plaintiff having been removed physically from his office due to his termination, Defendant Hughes in February 1996 stated to another employee in the U.S. Probation Office that Defendants Lanford and Hughes had tried everything with Plaintiff but it just didn't work out, that they had tried Plaintiff in supervision but he couldn't do that, that they had tried Plaintiff on PSI's but he couldn't do that, and that they had tried Plaintiff in Pre-trial Services and he could not do that either. Defendant Hughes then disclosed his discriminatory animus when he stated, "It must be a cultural thing."

79.

Plaintiff included the aforesaid discriminatory statement by Defendant Hughes in his allegations that were reviewed by Judge Hodge. In his subsequent report, Judge Hodge recites that Defendant Hughes did not recall making any such statement, but that if he did, it would have been in the context of Plaintiff's academic deficiencies. However, as shown in paragraphs 8 and 9 hereinabove, Plaintiff had received a Bachelors and Masters degree from predominantly minority (black) accredited institutions of higher learning, said criticism being again racist in nature and again disclosing Defendant Hughes' discriminatory animus on the basis of race and color.

80.

Defendants Lanford and Hughes unfairly and inaccurately characterized the person to whom Defendant Hughes had made such statement as a disgruntled employee when other persons in the Probation Office found that person to be a good worker whose only unhappiness was over the mistreatment being visited upon Plaintiff. These matters were also withheld from Judge Hodge by Defendants.

81.

Because of the material misrepresentations and half-truths taken out of context by Defendants in the course of an informal procedure where Defendants knew that Plaintiff would have neither the opportunity to review

the evidence they provided against him nor the opportunity to rebut same, Defendants materially misled U.S. Magistrate Judge Hodge, which misrepresentations of material fact and omissions of material fact led Judge Hodge to report, as they expected, that Judge Hodge recommended a ruling against Plaintiff.

82.

Chief U.S. District Judge Duross Fitzpatrick, solely in reliance upon the report and recommendation by Judge Hodge, after the informal investigation which was tainted by the material misrepresentations and omissions by Defendants, which misrepresentations were unknown as such to both Judge Fitzpatrick and Judge Hodge, approved the termination of Plaintiff from his employment as U.S. Probation Officer.

83.

Chief Judge Fitzpatrick notified Plaintiff by letter dated May 20, 1996, that he had approved the termination.

84.

Similarly situated white U.S. Probation Officers have not been terminated for the same alleged performance of duties as was Plaintiff.

* * *

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

KENNETH W. LEE,

Plaintiff

V.

ROBERT C. HUGHES, JR.
and
DANIEL C. LANFORD,
JR.,

Defendant

CIVIL ACTION NO.
5:96-CV-316-3

PLAINTIFF'S ANSWERS TO MANDATORY INTERROGATORIES

* * *

4.

Identify by full name, address, and telephone number all witnesses whom Plaintiff will or may have present at trial . . . (Attach witness list to Answers to Mandatory Interrogatories as Attachment "A").

* * *

Attachment "A"

Beth Thomas, U.S. Probation Office, . . . Macon, Georgia [address deleted] . . . , is a U.S. Probation Officer who principally does pre-sentence investigation (PSI) reports.

She will testify that Plaintiff was a good worker, conscientious, hard-working, worked late, came early,

and was knowledgeable. She went to him to ask how to do various things or what to do on various items, because of his experience and knowledge about the work done at the Probation Office. She never observed any disrespectful or inappropriate conduct by Plaintiff. She was surprised when Plaintiff was fired. Ms. Thomas will also testify regarding the relevant circumstances concerning the *Andy Tham* case. This was a person who was arrested for arson. . . . Ms. Thomas assisted Plaintiff as Plaintiff came up with a "life" estimate by cross-referencing to murder because a death had occurred in the course of the alleged arson. . . . She specifically recalls Defendant Hughes coming into her office and asking her to: "Explain it to me again" while he leaned on the doorway of her office. He had misread the case that had been cited to him, and she perceived that he was trying to prove Plaintiff wrong, not Ms. Thomas.

Ellen Moore, . . . Macon, Georgia [address deleted] . . . , is a U.S. Probation Officer who is currently a guideline specialist. Ms. Moore will testify that Plaintiff, in his job performance, was professional, cordial, knowledgeable, and that she was surprised when Plaintiff was terminated. She will further testify that she had not heard any negatives about Plaintiff while they both worked at the U.S. Probation Office.

Barry Stapleton, . . . Macon, Georgia [address deleted] . . . , will testify to the same effect as the other U.S. Probation Officers, that Defendant Hughes was constantly micro-managing the office. . . .

Mr. Stapleton will further testify that in June 1993, he was sent to Savannah for a seminar . . . related to pre-trial

services. . . . Mr. Stapleton wondered why Plaintiff was not there but Mr. Stapleton was. The Probation Service had just gone to a new report format and the seminar would have been extremely useful to a Probation Officer such as Plaintiff who worked, at that time, in pre-trial services. . . .

Mr. Stapleton will also testify that he, like other U.S. Probation Officers, excluding Plaintiff, got new furniture and curtains. He will testify that there was an office joke about Plaintiff not getting new furniture. . . .

Mr. Stapleton will also testify that he does not receive annual written performance appraisals, that he might have received one, and that it has been a period of years since he has received one.

Donny Allen, . . . Macon, Georgia [address deleted] . . . , is a U.S. Probation Officer. He started working in the Probation Office in 1992. He will testify that he received one written performance appraisal at the end of his one-year probationary period and has not received any written performance appraisals since then.

* * *

Mr. Allen will testify that Plaintiff worked long hours, was helpful to others, was courteous, has a good sense of humor, and that Mr. Allen looked up to Plaintiff and asked him how to do things in and around the office because of Plaintiff's obvious experience and knowledge. . . . He will testify that he has observed no negatives with regard to Plaintiff's job performance or knowledge.

* * *

Don Milleman, U.S. Probation Office, . . . Macon, Georgia [address deleted] . . . , is a U.S. Probation Officer who has been employed in the office since 1976 and worked with Plaintiff from 1983 until Plaintiff's termination in 1996. Mr. Milleman will testify that he was surprised, like everyone else in the office, when Plaintiff was terminated. Mr. Milleman will testify that Plaintiff did not waste time, was always doing something, was industrious and loyal, that he would trust Plaintiff's judgement and job knowledge, that Plaintiff was courteous and had no personal problems. Mr. Milleman found Plaintiff to be professional in stressful situations and made no public displays of temper or irritation.

* * *

Mr. Milleman will testify that in his 19 years of employment in the U.S. Probation Office in Macon, he cannot recall the last time he received a written performance appraisal. It has definitely been a number of years ago.

Betty Tapley, . . . Macon, Georgia [address deleted] . . . , is currently employed . . . [at] . . . Wesleyan College, Macon, Georgia. She was Plaintiff's secretary from October 1991 through February 13, 1996, having succeeded Rose Miller as Plaintiff's secretary.

* * *

. . . Defendant Hughes shortly thereafter explained to her why Plaintiff had been terminated. Defendant Hughes stated: "We gave him PSI and he couldn't do that. We gave him supervision and he couldn't do that.

We gave him bail and he couldn't do that. It must just be a cultural thing." Ms. Tapley was shocked at this discriminatory statement. She told this statement to Juanita Hawley and another woman at lunch that same day, and Ms. Tapley cried when she told them about it. This was essentially the last straw for Ms. Tapley and she voluntarily tendered her resignation because she could no longer work in such a place. At her exit interview, she told Mary Ann Edge and Rose Miller what Defendant Hughes had stated, and Ms. Edge had tears in her eyes.

Ms. Tapley did not consider herself a disgruntled employee, enjoyed working with Plaintiff, worked hard, but was not happy about the way Plaintiff had been mistreated in the office.

Rose Miller, . . . Macon, Georgia [address deleted] . . . , was Plaintiff's secretary for the first seven years that Plaintiff worked in the U.S. Probation Office. After being Plaintiff's secretary, known as a Clerk, Ms. Miller became the Chief Clerk. She now serves as personnel specialist, JS-11, for the last two years.

. . . Ms. Miller works, in the performance appraisal area, with the clerical staff's performance appraisals and was surprised to learn, subsequent to Plaintiff's termination, that a number of white U.S. Probation Officers have stated that they do not regularly receive written performance appraisals and had not received performance appraisals for a number of years. She is expected to testify that § 4.04 makes no exception for Probation Officers as contrasted with other employees of the Probation Service and that if there was such an exception, the

regulation would be written differently to account for Probation Officers as contrasted with clerical employees.

* * *

With regard to Ms. Betty Tapley, Ms. Miller will testify that Ms. Tapley was a very good employee. . . .

Ms. Miller will testify that Betty Tapley told her that Defendant Hughes said that because of cultural things, Plaintiff could not grasp certain things. To Ms. Miller, as an African American, this was a racist statement, and she was surprised when she heard this. . . .

With regard to the office furniture, Ms. Miller will testify that the only new equipment or furniture received in his thirteen years of employment was a desk calculator, and that it took four years for him to get it after he asked for it. Numerous other employees got new furniture while Plaintiff did not.

Claude W. Hicks, U.S. Magistrate Judge, . . . Macon, Georgia [address deleted] . . . , will testify that during the thirteen years while he has been first a part-time and then a full-time U.S. Magistrate Judge, he found the work done by Plaintiff performed on cases assigned to Judge Hicks to always be accurate, timely, complete and good work. . . . The point, according to Judge Hicks, is that if there were any deficiencies in Plaintiff's work, they were no different than those he saw in any other Probation Officer's work. . . .

* * *

Judge Hicks is expected to testify that over the years he has on occasion gone to lunch with either Defendant Lanford or Defendant Hughes and that they would ask

him about Plaintiff's work. Judge Hicks always told them that Plaintiff's work was good and that he had no problem with Plaintiff's work. . . .

Charles Calhoun, Chief of Criminal Division, U.S. Attorneys Office, . . . Macon, Georgia [address deleted] . . . , will testify that he is Chief of the Criminal Division, U.S. Attorney's Office, Middle District of Georgia. He has worked with Plaintiff for a number of years on cases prosecuted by Mr. Calhoun where Plaintiff was the assigned U.S. Probation Officer. On both bail reports and PSI's, Mr. Calhoun will testify that when he provided information to Plaintiff, and then Mr. Calhoun received the reports submitted to the Judge assigned to the case, the information provided by Mr. Calhoun had been fairly and accurately set out in the report by Plaintiff. He will further testify that Plaintiff requested the appropriate and pertinent information that Mr. Calhoun, as Prosecutor, wanted communicated to the Court. . . . He will testify that as Chief of the Criminal Division, he heard no reports of any problems by Assistant U.S. Attorneys with Plaintiff and heard no negatives in any regard about Plaintiff in the performance of his duties as a Probation Officer or in his relationships with the U.S. Attorneys Office. Mr. Calhoun will testify that he was surprised, like the other prosecutors in his office, to learn that Plaintiff had been terminated by the U.S. Probation Office earlier this year.

* * *

Randall D. Russell, Faulkner & Russell, . . . Macon, Georgia [address deleted] . . . , is a lawyer in private practice in Macon, Georgia. Mr. Russell includes in his

practice the defense of criminal cases in the U.S. District Court for the Middle District of Georgia. Over the years, he has had numerous opportunities to work with Plaintiff on cases where Plaintiff was assigned as the Probation Officer working on the case of Mr. Russell's client. Mr. Russell found that, from a defense lawyer's viewpoint, Plaintiff always included the information provided by Mr. Russell in an accurate and fair manner in the reports submitted by Plaintiff to the judge assigned to the case. Mr. Russell is also expected to testify that Plaintiff asked Mr. Russell for the appropriate and pertinent information that Mr. Russell, as a criminal defense lawyer, would want presented to the judge assigned to his client's case. Mr. Russell found Plaintiff to be knowledgeable and easy to work with. Mr. Russell was shocked and surprised to learn that Plaintiff had been terminated from his position as a U.S. Probation Officer earlier this year.

Richard L. Hodge, U.S. Magistrate Judge, . . . Albany, Georgia [address deleted] . . . , was assigned to conduct an informal inquiry into the circumstances of Plaintiff's termination. He is expected to testify that he did not hold hearings but instead conducted informal interviews of Plaintiff, various persons named by Plaintiff as witnesses, Defendants Lanford and Hughes, and reviewed a number of documents, including those provided by Defendants Lanford and Hughes. . . .

It is expected that Judge Hodge will testify that he was not informed of the information listed above showing disparate treatment in written performance appraisals or the matters listed above rebutting various matters in Defendant Lanford's written presentation.

Duross Fitzpatrick, Chief U.S. District Judge, . . . Macon, Georgia [address deleted] . . . , is expected to testify that he made his decision to approve Defendant Lanford's proposed firing of Plaintiff based solely upon the report that Judge Hodge provided to him concerning Plaintiff's allegation of discrimination. As Chief U.S. District Judge, Chief Judge Fitzpatrick is the chief administrative officer of the District Court and his approval was required in order to implement the termination proposed by Defendants Hughes and Lanford.

Kenneth W. Lee, . . . Macon, Georgia [address deleted] . . . , is the Plaintiff in this case.

* * *

. . . [O]nly Plaintiff was issued adverse performance appraisals, marked down in his performance appraisals and otherwise written up as a result of such criticisms. Mr. Lee will testify that subsequent to his termination, he has learned from a number of white Probation Officers that they have not received regular annual written performance appraisals, and that a number of them cannot recall the last time they received one, or only received one after their probationary period and none since then. . . . Again, even though they received these same types of inconsistent and arbitrary instructions and were directed to rewrite reports for such reasons, none of the white U.S. Probation Officers were written up or otherwise marked down on their performance appraisals by Defendants.

Mr. Lee will testify that in 1993 he was working in pre-trial services and was no longer a generalist. A training session was scheduled by the Administrative Office

of the U.S. Courts to be held in Savannah, Georgia, concerning Critical Writing. The Probation Service had changed a number of its forms nationally including those involving bail reports and other reports that were to be frequently used in pre-trial service units. Although Mr. Lee had been scheduled to attend the seminar, he will testify that the Defendants canceled his attendance. They never gave him a satisfactory reason why he did not go.

* * *

Mr. Lee also requested after his termination that he be provided with a copy of his official personnel folder because Defendant Lanford's written response and U.S. Magistrate Judge Hodge's report reflect an assertion that Defendant Hughes and Lanford had been documenting Mr. Lee's alleged deficiencies in writing and placing them in his official personnel file. . . . Thus, Defendant Lanford has admitted to Mr. Lee that, contrary to the written statement to Judge Hodge by Defendant Lanford, the written criticisms were not routinely filed in the official personnel folder of Mr. Lee, raising a reasonable inference that Defendant Lanford did not follow regular procedures and also is not reliable on the other information provided to Judge Hodge. . . .

SUPPLEMENTAL APPENDIX C

No. 97-8423

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KENNETH W. LEE,
Plaintiff-Appellant,

v.

ROBERT C. HUGHES, JR., and
DANIEL C. LANFORD, JR.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR APPELLEES

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* * *

In the event that an employee's complaint is sustained by the Chief Judge, the Chief Judge could reinstate an improperly terminated probation officer pursuant to 18 U.S.C. § 3602(a). Moreover, if the employee incurred any lost pay, the employee would be entitled to back pay, with interest, pursuant to the Back Pay Act, as amended in 1990. In the Back Pay Act, Congress provided that, if a covered federal employee is found "by appropriate authority under applicable law, rule, [or] regulation" to have been "affected by an unjustified or unwarranted personnel action" resulting in a loss of pay, the employee is entitled, "on correction of the personnel action," to the lost pay with interest. *See* 5 U.S.C. § 5596(b)(1)(i), (b)(2)(A).

As the district court recognized, a Back Pay Act remedy would be available to a party prevailing in the administrative grievance process available to plaintiff here. *See* R-25 at 3.

* * *

SUPPLEMENTAL APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appeal No. 97-8423

KENNETH W. LEE,
Plaintiff-Appellant

v.

ROBERT C. HUGHES, JR., and
DANIEL C. LANFORD, JR.,
Defendants-Appellees

On Appeal from the United States District Court
for the Middle District of Georgia, Macon Division

JOINT SUBMISSION OF ADDITIONAL MATERIALS
PURSUANT TO COURT'S DIRECTION

(Received Apr. 16, 1998)

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* * *

[Tab S-3]

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VIA FACSIMILE (912) 752-3502

April 1, 1996

THE HONORABLE DUROSS FITZPATRICK
United States District Court
Middle District of Georgia
Macon Division
Post Office Box 1014
Macon, Georgia 31202

Re: Kenneth W. Lee

Dear Judge Fitzpatrick:

I am writing you pursuant to the pending dismissal of my above-referenced client. I have been in touch with The Honorable Richard L. Hodge, whom you appointed as the Equal Employment Opportunity Coordinator in this case. It is Judge Hodge's understanding that Ken would remain on administrative leave *with pay* until the resolution of the objections to his dismissal and the Equal Employment Opportunity Complaint are concluded. He said for me to check with you, and I am simply contacting your office to be certain that his understanding is correct.

Please contact me immediately if Mr. Lee is not to remain on administrative leave with pay. Thank you for your kind attention in this matter.

I am,

Sincerely,

/s/ L. D. Wolfe
L. David Wolfe, P.C.

LDW:adm

[Tab S-6]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

IN THE MATTER OF: KENNETH LEE
U. S. PROBATION OFFICER

CONFERENCE

IN MACON, GEORGIA MAY 15, 1996

HONORABLE DUROSS FITZPATRICK,
U.S. District Judge, Presiding

APPEARANCES:

For Mr. Lee: MR. DAVID WOLFE
Attorney at Law
Suite 300
Peachtree Palisades West
1800 Peachtree St., N.W.
Atlanta, Georgia 30309

For U.S. Probation Dept.:

MR. DAN LANFORD and
MR. ROBIN HUGHES
433 Walnut Street
Macon, Georgia 31201

* * *

THE COURT: And there's no set procedure. I mean, it's not a hearing, there's no rules of evidence, no witnesses to be called, the way I see it. The way I see it is I just listen to you and to Mr. Lee, if he was here, and based on that, decide whether or not to approve of this action.

MR. WOLFE: May I say a couple of things?

THE COURT: Oh, yeah. I mean, as far as I'm concerned, there's no particular rules in effect here. This is basically a discussion around the table.

* * *

[Tab S-8]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
475 MULBERRY STREET
POST OFFICE BOX 1014
MACON, GEORGIA 31202

CHAMBERS OF
DUROSS FITZPATRICK
CHIEF JUDGE

AREA CODE 912
TEL: 752-3500
FAX: 752-3502

May 20, 1996

VIA FACSIMILE

Mr. L. David Wolfe
Wolfe & Steel, P.C.
Suite 300, Peachtree Palisades West
1800 Peachtree Street, N.W.
Atlanta, GA 30309

RE: Kenneth W. Lee
United States Probation Officer
Termination of Employment

Dear Mr. Wolfe:

After much consideration I can find no reason to overrule Mr. Lanford's decision terminating your client. Therefore, it appears that his termination is final.

Sincerely,

/s/ Duross Fitzpatrick
Duross Fitzpatrick

DF/bb

c: Mr. Dan Lanford